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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 30.

KEITH MARTIN,
Appellant,

vs.

JOSEPH S. DAVIS, As Probate Judge
of Johnson County, Kansas,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF KANSAS.

BRIEF OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS, AMICUS CURIAE.

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STATEMENT.

This is an appeal from the decision of the Supreme Court of Kansas[1] affirming a judgment of the District Court of Johnson County, Kansas, quashing appellant's alternative writ of mandamus. By this writ appellant

1. *Martin v. Davis, Probate Judge*, 187 Kan. 473, 357 P.2d 782

sought to be permitted to practice law in the Probate Court of said county without asosciating with himself an attorney residing and maintaining an office in said county, which constitutes the Tenth Judicial District of Kansas. The controversy arises out of certain rules of the Supreme Court of Kansas regulating the practice of law in that state. The appellant Martin was admitted to practice law in all the courts of Kansas by the Supreme Court on February 12, 1948, some six months after he was admitted to the bar of Missouri. As to his professional qualifications and his personal character there is no question. He is a resident of Johnson County, Kansas, which county adjoins the City of Kansas City, Missouri, in which city appellant maintains his law office and which is the place where most of his office practice is carried on. He also maintains an office at his home in Johnson County, Kansas.

In March, 1959, Martin filed the divorce action of Taylor vs. Taylor in the District Court of Wyandotte County, Kansas.[1] His right as a member of the Missouri bar to file said case was challenged by a motion to strike the petition from the files. The trial court ordered him to associate with himself "local counsel pursuant to amended court rules 41 and 54". Having failed to do so, the petition was ordered stricken. An appeal was taken from this order to the Supreme Court of Kansas,[2] which affirmed the judgment of the trial court. Thereafter that decision was appealed to the Supreme Court of the United States. This appeal was dismissed for want of a substantial federal question.[3]

Thereafter appellant commenced the present action in the District Court of Johnson County, Kansas, for an order

2. *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190.

3. *Taylor* v. *Taylor*, No. 552, 1959, 361 U.S. 374.

of mandamus requiring the appellee Davis, as Probate Judge of Johnson County, Kansas, to permit appellant to file cases in the Probate Court and to appear therein and try them without associating with himself local counsel as required by Rules 41 and 54 of the Supreme Court, and to declare said rules unconstitutional and void as contravening the fourteenth amendment to the federal constitution. The trial court quashed the alternative writ and Martin appealed to the Supreme Court of Kansas, which affirmed the ruling of the trial court, and it was held that the rules in question were not in violation of the due process and equal protection clauses of the Fourteenth Amendment. It is to review this decision that the present appeal is taken.[4]

The opening sentence of the opinion of the Supreme Court of Kansas, in deciding this case when before it, succinctly states the problem now before this court. Said statement reads as follows:

> "At issue is the power of the Supreme Court of Kansas to control and supervise the practice of law by Kansas licensed attorneys regularly engaged in the practice of law in another state."

It is because of this aspect of the case that the Attorney General of Kansas believes it desirable that this brief, *amicus curiae*, should be presented to this court.

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4. *Martin* v. *Davis, Probate Judge*, 187 Kan. 473, 357 P.2d 782.

ARGUMENT.

I.

Rules 41 and 54 Have As Their Basis the Exercise of the Police Power to Promote the General Welfare.

Rule 41 in its present form was adopted in 1958. It relates to admissions to the bar, but by said amendment the order of admission is subject to the following limitation:

> "provided further, however: the authority to practice law shall not be exercised except as provided by Rule 54, infra, when the licensee has been admitted to the bar of another state or territory and is regularly engaged in the practice of law in such other state or territory."

Rule 54, also adopted in 1958, above referred to is as follows:

> "An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding, a member of the bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record."[5]

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5. These rules as amended and in force at the time this action was commenced are published in 186 Kansas Reports at pages XVII and XIX, respectively.

In the Kansas Supreme Court, appellant limited his case to an attack on these two rules, contending (1) that the Supreme Court did not have power to adopt these rules; (2) that these rules were not in effect when he was admitted to practice in 1948; (3) that these rules violated the due process and equal protection clauses of the fourteenth amendment to the federal constitution; and (4) undue hardship to appellant by reason of loss of income. The court rejected all these contentions and specifically held that said rules did not violate said constitutional provisions. In the present appeal Martin presents the constitutional question as related to these rules. The question now before this court is the validity of the rules when tested by the constitutional requirements of due process and equal protection.

With reference to the judicial branch of government, the Constitution of Kansas provides that:

> "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace and such other courts, inferior to the supreme court as may be provided by law."[6]

By Art. III, Sec. 3, the jurisdiction of the Supreme Court is stated as original jurisdiction in cases of quo warranto, mandamus and habeas corpus, and such appellate jurisdiction as may be provided by law. Nowhere in the constitution is there an express grant to that court of any power over admissions to practice law or of any power to regulate or discipline attorneys who have been admitted to the bar. This absence of express authorization is now covered by statute,[7] but in a disbarment case[8] it was

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6. Kansas Constitution, Art. III, Sec. 1.

7. G.S. 1949, 7-103, and 7-111 to 7-116.

8. *In re Gorsuch*, 113 Kan. 380, 384, 214 Pac. 794.

argued that the supreme court has no jurisdiction over such proceedings since the jurisdiction of the supreme court as fixed by the constitution could not be enlarged by legislative action. The court rejected this contention, saying that such authority would exist even if there were no statute. Some years previously it had been held that the power to admit to the practice of law is a judicial, and not a legislative function and is vested in the courts only.[9] This is in accord with the statement of this court that admissions to practice law and exclusions therefrom are not the exercise of a mere ministerial power, but the exercise of judicial power.[10] The power to regulate the practice of law is inherent in the state supreme court, nevertheless statutes which grant such power to the courts are more than a mere gesture, and indeed have a useful function. This was the subject of comment in a disbarment case[11] where a statute required the court to enter an order of disbarment upon receipt of a certified copy of a judgment of an attorney's conviction of a felony, and it was argued that this violated the letter and spirit of the fourteenth amendment. The court there said:

> "While it is inherently a judicial function of courts to control the conduct of attorneys and within limits courts have power to say who may and who may not practice before their tribunals (In re Gorsuch, 113 Kan. 380, 384 and 385, 214 Pac. 794), yet it is the indisputable prerogative of the legislature to declare the public policy of the state; and it is a highly pertinent and proper exercise of that prerogative for the legislature to declare that only persons of special qualifications and of good moral character can be ad-

9. *Hanson* v. *Grattan*, 84 Kan. 380, 115 Pac. 646.

10. *In re Garland*, 4 Wall. 333, 18 L. Ed. 366, 370.

11. *In re Casebier*, 129 Kan. 853, 856, 284 Pac. 611.

> mitted to practice law, and that if that status of good moral character is shown to have been lost, as by proof of conviction of a felony or misdemeanor involving moral turpitude, the right to practice law is at an end."

The foregoing is not without a material bearing on the present case, for as long ago as 1935[12] the legislature of Kansas laid down the public policy of the state with reference to practice in Kansas courts by attorneys from other states. It is the special province of the legislature to determine what the public policy of the state shall be.

> "The right to determine what is the best policy for its people is in the legislature and courts cannot assume that they have a wisdom superior to that of the legislature."[13]

Previous to enactment of the 1935 act, the statute merely provided that any practicing attorney of any state, having business before the district or supreme courts of Kansas, might on motion and taking the usual oath be admitted to practice in either of said courts. It is reasonable to infer that this liberal provision did not prevent abuses and that the circumstances were brought to the attention of the legislature, which in its wisdom endeavored to provide against what it considered to be an obstacle to the proper administration of justice.

Evidently the 1935 law did not provide a sufficient remedy. It contained a reciprocity provision which was eliminated by an amendment in 1939. A further amendment to its present form was made, L. 1947, Ch. 94. This now appears as G.S. 1949, 7-104, the pertinent part of which is as follows:

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12. L. 1935, Ch. 69.

13. *McAllister* v. *Fair*, 72 Kan. 533, 536, 84 Pac. 112.

"Any regularly admitted practicing attorney in the courts of record of another state or territory having professional business in the courts or before any board, department, commission or other administrative tribunal or agency of this state, may, on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state upon whom service may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of and amenable to disciplinary action by the courts, agencies or tribunals of this state: Provided, That in all actions before a court of record said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding, while the same is begun, carried on or maintained in violation of the provisions of this section."

This statute, in its various forms, is the background and the occasion of Rules 41 and 54. Pursuant thereto the Supreme Court, in 1936, adopted Rule 54, which differs from its present form in that it required only that the associated attorney be a resident of the state. This did not quite conform to the statute and by the 1958 amendment it was required that the associated counsel be "a member of the bar of this state qualified under the provisions of G.S. 1949, 7-104." At the same time Rule 41, relating to admissions to the bar and which had hitherto remained un-

changed, was amended by the addition of the provision th the right to practice should not be exercised except as pr vided under Rule 54. The legislature having declared t public policy of the state, the Supreme Court, in obedien to this legislative declaration of public policy, and in t exercise of its inherent and statutory powers, adopted t rules now in question to implement the statutory manda

II.

The Rules in Question Are a Reasonable and Valid Exercise of the Police Power.

The exercise of police power has been circumscrib by the Supreme Court of Kansas as follows:

> "The police power is said to be inherent in gover ment, but can only be exercised by authority of legi lative enactment. It is for the legislature to determi what laws are needful and appropriate to promote t public welfare and to prevent the infliction of publ injury. So long as the legislature, in attempting exercise this power, does not violate any of the pr visions of the organic law or encroach upon some pow vested in congress by the federal constitution, the e ercise of its discretion is not subject to review by t courts."[14]

In the present case appellant contends that Rules and 54 go beyond a proper exercise of the police power that they are unreasonable and arbitrary and hence viola the due process and equal protection clauses of the fou teenth amendment. If this be correct, these rules ma by the Supreme Court of Kansas cannot be enforced again appellant.

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14. *Balch* v. *Glenn*, 85 Kan. 735, 741, 119 Pac. 67.

1. The matter to which these rules relate is a subject proper to be protected by the police power.

The purpose of the rules in question is to promote the administration of justice in the State of Kansas and to enable its courts to function more efficiently. This is definitely a matter which affects the public welfare of the state and its citizens. The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as the public health, morals and safety.[15] The promoting the administration of justice is a legitimate public purpose, one which is entitled to the protection afforded by regulations promulgated under the police power of the state. Supervision of the practice of the learned professions has long been held a subject for regulation under the police power.[16]

2. The rules in question are reasonable under the existing circumstances.

The validity of a police regulation depends upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.[17]

From what has already been said, it is clear that the rules in question, and the statute on which they are based, were not the result of any hasty impulse. Their history, extending over a quarter of a century, and the various changes made to secure better results, indicate the serious

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15. *Chicago, B. & Q. Ry.* v. *Illinois*, 200 U.S. 561, 50 L. Ed. 596, 609.

16. *Dent* v. *West Virginia*, 129 U.S. 114, 32 L. Ed. 623. To like effect see *State* v. *Creditor*, 44 Kan. 565, 24 Pac. 346; *Meffert* v. *Medical Board*, 66 Kan. 710, 72 Pac. 247.

17. *Chicago, B. & Q. Ry.* v. *Illinois*, 200 U.S. 561, 50 L. Ed. 596, 609.

nature of the problem and the difficulty in dealing with it. The existence of an evil for which a remedy was indicated may properly be inferred from the enactment of a police regulation by the legislature and its subsequent validation, after challenge, by the State Supreme Court.[18] But aside from such inference, the statutes and Rule 54 expressly refer to one phase of the problem. Each of them, beginning with the 1935 Act, expressly states that one purpose to be served by the local counsel was to expedite and facilitate the service of notices and other papers necessary in the progress of the litigation. Evidently some difficulty had occurred in such matters where the attorney lived in another state. There was always the possibility of loss or delays, real or feigned, in the United States mail. This difficulty, with its attendant delay, would be obviated by requiring the association of local counsel who could easily and promptly be served, and who would be amenable to the court's discipline, as a lawyer in another state might not be.

A further reason for the regulation is that counsel from another state may not be sufficiently versed in the law of Kansas to give his client the best service or to be of any real assistance to the court. An example may be found in a case where plaintiff's attorney, although admitted to the bar of the Kansas Supreme Court in 1891, had long resided in another state and took no cognizance of substantial changes in the Kansas probate law enacted during his absence.[19] In a later case the Kansas Supreme Court dwelt on this phase of the matter and suggested the further ground of amenability to the court's orders:[20]

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18. *O'Gorman & Young* v. *Hartford F. Ins. Co.*, 282 U.S. 251, 75 L. Ed. 324.

19. *Felton* v. *Rubow*, 163 Kan. 82, 179 P.2d 935.

20. *Thornburg* v. *McClelland*, 186 Kan. 23, 348 P.2d 617.

> "It may be observed that the purpose of the statute is two-fold. It has been believed that lawyers not regularly practicing in the state are not usually familiar with the law and procedure thereof and that the public is entitled to have adequate counsel; and second, that the trial court should have complete and immediate jurisdiction over counsel appearing in the case."

While the problem of law practice by attorneys from another state is particularly acute in the Kansas City area, it is also a live issue in all the other 41 border counties of Kansas, and also arises in the interior counties frequently. The situation was grave enough to demand the attention of the legislature in 1935, and again in 1939 and again in 1947 when the statute now in force was enacted. The legislature concluded that the difficulties of service of notice, of amenability to the court's orders, and of lack of adequate knowledge of Kansas laws arising from efforts of lawyers from other states constituted a public evil.

3. The remedy provided by the statute and rules has a substantial relation to a public purpose.

Acting under its police power, the legislature, in the exercise of its wisdom and discretion, undertook to provide a remedy by placing restrictions upon such practice. This the legislature could do.

> "It is well established that when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adapt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. (Citations) With the wisdom of the exercise

> of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature—a notion foreign to our constitutional system.[21]

The effect of the statute and rules in question is not to prevent lawyers admitted and regularly practicing in other states from trying their cases in Kansas Courts. All that is required of them is that they associate with themselves local counsel upon whom notices can be served, who are more closely under the supervision of the court, and who can supply needed information as to Kansas law. The object of such requirement is merely to remove what doubtless experience had proved to be a hindrance to the work of the courts. This limitation upon the activity of lawyers from other jurisdictions is not unreasonable and bears a substantial relation to the ills sought to be remedied.

Appellant complains that the Kansas Supreme Court violated its own rule that judicial notice will not be taken of what occurred in cases other than the one on trial. Such is the rule as to the record in other cases, but the objection made is not good. In considering statutes passed in the exercise of the police power, it is presumed, from the fact that the legislature acted, that it did so on sufficient grounds.[22] It would seem from this that the burden of showing that there were no sufficient grounds for the enactment of the statute or the adoption of the rule rests upon appellant.

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21. *Purity Extract & T. Co.* v. *Lynch*, 226 U.S. 192, 57 L. Ed. 184, 187.

22. *Rast* v. *Van Deman and Lewis Co.*, 240 U.S. 341, 60 L. Ed. 679.

In the opinion of the Kansas Supreme Court reference is made to geographical situation, population and location of industries in the area. These are facts of which the court could take judicial notice. Mention was also made of the volume of litigation in the area. Statistics on this subject are annually assembled and published by the Judicial Council. Copies thereof are supplied gratis to all lawyers, libraries, newspapers and citizens who request it. This information is thus easily available to everyone. Reference was also made to the number of lawyers in the area, but this information can be obtained from any legal, city or telephone directory. It is not contended that the facts stated by the court are incorrect, and appellant suffered no harm from the court's consideration of them.

The rule referred to by appellant excludes from consideration in a contested lawsuit the record of some other case; but that is not the situation here. When the opinion refers to the difficulties experienced in procuring attendance of lawyers regularly practicing in other states, and in procuring service on them, and in the lack of familiarity with Kansas law, the court did not rely upon the records of other cases but upon its judicial knowledge gained over the years. The matters referred to reflect, not the record, but the court's long experience, and are stated in explanation of the reasons which moved the court to adopt the rules in question. Surely judges ought not to be expected to ignore the things their experience on the bench has taught them. "This court is entitled to take knowledge of its own acts and those of its chief justice."[23]

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23 *Anderson* v. *Madden*, (Ore.) 288 P.2d 823.

III.

Being a Valid Exercise of the Police Power, the Rules in Question Do Not Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The due process clause is a limitation on the police power to the extent of preventing the arbitrary or unreasonable exercise of that power;

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[24]

The difficulties in various situations arising from the efforts of attorneys from other states to practice in the Kansas courts, the wide extent of the problem, especially in the border counties, and the long continued and repeated efforts of the legislature and the court to secure more adequate safeguards against what was deemed a hindrance to the work of the Kansas courts, supply the background for the adoption of Rules 41 and 54 as they now exist. They demonstrate that substantial reasons existed for the promulgation and enforcement of these rules. And the means selected to combat these hindrances have a real and substantial relation to the end sought to be accomplished. These rules, therefore, do not contravene the due process clause.

Equal protection of the laws means that like treatment must be accorded to all in like circumstances. Classification is not forbidden provided the distinctions made are reasonable[25] and not arbitrary and are founded

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24. *Nebbia* v. *Peo.*, 291 U.S. 502, 78 L. Ed. 940.

25. *Puget Sound P. & L. Co.* v. *Seattle*, 291 U.S. 619, 78 L. Ed. 1025.

upon substantial differences which have a reasonable relation to the persons dealt with and to the public purpose sought to be accomplished. The statute and rules in question meet this test. The distinction they draw is between lawyers regularly admitted and practicing in another state who desire to try cases in Kansas, on the one hand, and those admitted to practice in Kansas and regularly practicing there.

This line of demarcation is reasonable. Even the most capable lawyer whose major preoccupation is with the law of his own state is likely not as conversant with Kansas law, substantive and procedural, as is the lawyer who gives these subjects his constant attention. In addition, the lawyer regularly practicing elsewhere may not be available for prompt service of papers upon him nor is he easily amenable to the orders of the court as is local counsel. These are not merely occasional situations nor is their hindrance to the work of the courts imaginary, and the legislature and the Supreme Court were entitled to provide a remedy. The remedy chosen had a reasonable relation to the persons dealt with and to the public purpose sought to be accomplished.

> "It is established that a distinction in legislation is not arbitrary if any state of facts reasonable can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed * * *. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety * * *. It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare * * *. And we repeat 'it may make discriminations if founded on

distinctions that we cannot pronounce unreasonable and purely arbitrary'."[26]

The result of classification is that those within the class have rights or suffer burdens which others do not. Appellant complains of the specific hardship to which the restriction subjects him; but the fourteenth amendment does not purport to protect against every injurious or oppressive action by a state.[27] It may be that because of his Kansas residence and his experience with Kansas law, the statute and the rules in question operate more severely on appellant than they do upon most lawyers who practice in some other state. However, it must be remembered that Sec. 7-104, in its present form was in force when he applied for a license to practice law, as was also G.S. 1949, 603825, authorizing the Supreme Court to "make and amend" rules to regulate procedure in the Supreme Court and inferior courts. Appellant must have known of these statutes and consented to them, and that when such rules were so made or amended, he would be subject to them. By his own voluntary choice, he has put himself in the class of attorneys practicing regularly in another state. He is not forbidden to appear in Kansas courts, but when so appearing, like all other attorneys regularly practicing in other states, he must associate local counsel with himself. And if local counsel's fee under the minimum fee schedules for the particular jurisdiction are unfair or unduly burdensome, neither the legislature nor the Supreme Court of Kansas is responsible therefor. The possible application of a regulation to extreme cases is not the test of constitutionality to be applied to such regulation.[28]

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26. *Rast* v. *Van Deman and Lewis Co.*, 240 U.S. 341, 60 L. Ed. 679.

27. *Puget Sound P & L Co.* v. *Seattle*, 291 U.S. 619, 78 L. Ed. 1025.

28. *Lemieux* v. *Young*, 211 U.S. 489, 53 L. Ed. 295.

Appellant argues that the words "regularly practicing outside of this state" appearing in Rule 54 provide no standard by which what constitutes "regularly practicing" may be determined, that the term is so vague and uncertain as to be invalid. Appellant is in no position to so contend for by his own statements he comes within the class of attorneys regularly practicing in other states. His jurisdictional statement recites that since 1947 he has "engaged in the general practice in Missouri" (p. 9), where he maintains an office, and is a member of the local bar association and of the integrated bar of that state (p. 10). He consults with as many clients in his Kansas City, Missouri, office as he does at his home in Kansas, and that most of his office work is done at his Missouri office, where he earns approximately one-half of his annual earnings in the practice of his profession (p. 11). From his own statements it cannot be said that there is any question but what he is "regularly practicing" law in the State of Missouri. He is therefore within that class which the statute and the rules require the association with him of local counsel when he appears in Kansas courts.

CONCLUSION.

This, then, is the appellee's case:

1. Charged with promoting the general welfare of its citizens, the Kansas legislature determined that the work of its courts was hindered by lawyers from other states attempting to try cases in Kansas because of difficulties in service of notices, inability of the courts to exercise close supervision over them, and from lack of familiarity with Kansas law.

2. To prevent such hindrances, the legislature of Kansas enacted Sec. 7-104 requiring that local counsel be

associated with such lawyers regularly practicing in other states.

5. In obedience to the legislative mandate and to implement said statute, the Kansas Supreme Court adopted its present Rules 41 and 54.

4. The statute and said rules are not arbitrary but are reasonable, the restriction imposed thereby being based on substantial differences and having reasonable relation to the attorneys thereby affected and the public purpose sought to be accomplished.

5. The appellant Martin comes within the restricted class in that he practices law regularly in the State of Missouri and he is not excepted merely because he resides in Kansas and maintains an office in his home.

6. Said statute and rules do not violate the due process and equal protection clauses of the fourteenth amendment and said statute and rules constitute a valid exercise of the state's police power.

7. The decision of the Supreme Court of Kansas in this case should be affirmed.

Respectfully submitted,

WILLIAM M. FERGUSON,
Attorney General of Kansas,
Amicus Curiae